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Hong Kong Evidence Law Notes

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1. INTRODUCTION

A. HOW TO USE CONVERSION NOTES

The Hong Kong Evidence Law Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied. You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

Issue State the legal issue relevant to the problem

Law Identify the relevant case law and legislation

Analysis Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.

Conclusion Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS AND LEGISLATION

The Hong Kong Evidence Law Notes will refer frequently to the following using abbreviations.

CPO	Criminal Procedure Ordinance (Cap 221)
EO	Evidence Ordinance (Cap 8)
JOO	Juvenile Offenders Ordinance (Cap 226)
ROO	Rehabilitation of Offenders Ordinance (Cap 297)
Rules and Directions	Rules and directions for the questioning of suspects

The Hong Kong Evidence Law Notes will also refer frequently the Specimen Directions (available at http://legalref.judiciary.gov.hk/doc/sp_dir/pdf/eng/SDJT.pdf).

2. INTRODUCTION

A. PRINCIPAL ITEMS AND CLASSIFICATION OF EVIDENCE

- There are various types of evidence including:
 - Oral evidence
 - Documentary evidence
 - Digital evidence (i.e. internet browser records and email correspondence) and
 - Real evidence
- Evidence may be either direct evidence (directly proves or disproves a fact in issue) or circumstantial evidence (indirectly proves or disproves a fact in issue).
- Section 22 of the EO provides for the admissibility of documentary records.
 - Section 22(1) provides that subject to this section and section 22B, a statement contained in a document shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if-
 - (a) direct oral evidence of that fact would be admissible in those proceedings; and



- (b) the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and
- (c) the person who supplied the information-
 - (i) is dead or by reason of his bodily or mental condition unfit to attend as a witness;
 - (ii) is outside Hong Kong and it is not reasonably practicable to secure his attendance;
 - (iii) cannot be identified and all reasonable steps have been taken to identify him;
 - (iv) his identity being known, cannot be found and all reasonable steps have been taken to find him;
 - (v) cannot reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information; or
 - (vi) having regard to all the circumstances of the case, cannot be called as a witness without his being so called being likely to cause undue delay or expense.

- Section 22 (2) provides that a statement made in connection with any criminal proceedings or with any investigation relating or leading to any criminal proceedings shall not be admissible under this section.
- Section 22 (3) further provides that subsection (1) applies whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty; and that subsection applies also where the person who compiled the record also supplied the information.
- Section 22 (4) provides that where in any criminal proceedings a statement based on information supplied by any person is given in evidence by virtue of this section-
 - (a) any evidence which, if that person had been called as a witness, would have been admissible as relevant to his credibility as a witness shall be admissible for that purpose in those proceedings; and
 - (b) evidence tending to prove that that person has, whether before or after supplying the information, made a statement (whether oral or otherwise) which is inconsistent with that information shall be admissible for the purpose of showing that he has contradicted himself:

Provided that nothing in this subsection shall enable evidence to be given of any matter of which, if the person in question had been called as a witness and had denied that matter in cross-examination, evidence could not have been adduced by the cross-examining party.

- Section 22 (5) provides that a statement which is admissible by virtue of this section shall not be capable of corroborating evidence given by the person who supplied the information on which the statement is based.
- Section 22 (6) provides that in deciding for the purposes of subsection (1)(c)(i) whether a person is unfit to attend as a witness the court may act on a certificate purporting to be signed by a medical practitioner registered or deemed to be registered under the Medical Registration Ordinance (Cap 161).
- Section 22 (7) provides that any reference in this section to a person acting under a duty includes a reference to a person acting in the course of any occupation in which he is engaged or employed or for the purposes of any paid or unpaid office held by him.
- Section 22 (8) provides that this section does not apply to any document to which section 22A applies.
- Section 22A deals with computer records as documentary evidence.
 - Section 22A(1) provides that subject to this section and section 22B, a statement contained in a document produced by a computer shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if-
 - (a) direct oral evidence of that fact would be admissible in those proceedings; and
 - (b) it is shown that the conditions in subsection (2) are satisfied in relation to the statement and computer in question.
 - Section 22A (2) provides that the conditions referred to in subsection (1)(b) are-
 - (a) that the computer was used to store, process or retrieve information for the purposes of any activities carried on by any body or individual;
 - (b) that the information contained in the statement reproduces or is derived from information supplied to the computer in the course of those activities; and
 - (c) that while the computer was so used in the course of those activities-
 - (i) appropriate measures were in force for preventing unauthorized interference with the computer; and
 - (ii) the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents.
 - Section 22A (3) provides that notwithstanding subsection (1), a statement contained in a document produced by a computer used over any period to store, process or retrieve information for the purposes of any activities ("the



relevant activities") carried on over that period shall be admitted in any criminal proceedings as prima facie evidence of any fact stated therein if-

- (a) direct oral evidence of that fact would be admissible in those proceedings;
- (b) it is shown that no person (other than a person charged with an offence to which such statement relates) who occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities-
 - (i) can be found; or
 - (ii) if such a person is found, is willing and able to give evidence relating to the operation of the computer during that period;
- (c) the document was so produced under the direction of a person having practical knowledge of and experience in the use of computers as a means of storing, processing or retrieving information; and
- (d) at the time that the document was so produced the computer was operating properly or, if not, any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the accuracy of its contents,

but a statement contained in any such document which is tendered in evidence in criminal proceedings by or on behalf of any person charged with an offence to which such statement relates shall not be admissible under this subsection if that person occupied a responsible position during that period in relation to the operation of the computer or the management of the relevant activities.

- Section 22A (4) provides that where over a period the function of storing, processing or retrieving information for the purposes of any activities carried on over that period was performed by computer, whether-
 - (a) by a combination of computers operating over that period; or
 - (b) by different computers operating in succession over that period; or
 - (c) by different combinations of computers operating in succession over that period; or
 - (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,
 - (e) all the computers used for that purpose whether by one or more persons or bodies during that period shall be treated for the purposes of this section as constituting a single computer.
- Section 22A (9) provides that for the purposes of this section-
 - (a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;
 - (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored, processed or retrieved for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
 - (c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.
- Section 22A (11) provides that nothing in this section affects the admissibility of a document produced by a computer where the document is tendered otherwise than for the purpose of proving a fact stated in it.
- Section 22A (12) provides that subject to subsection (4), In this section "computer" (電腦) means any device for storing, processing or retrieving information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

B. RELEVANCE

- To be admitted into court, a piece of evidence must be relevant to a fact in issue. Relevant (i.e. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable (*DPP v Kilbourne* [1973] AC 729).
- Both direct and circumstantial evidence may be relevant and admitted into court.

C. ADMISSIBILITY

- Generally, all relevant evidence is admissible. This general rule however is subject to many exclusionary rules. For example:
 - Even if a piece of evidence is relevant to a fact in issue, it may be ruled inadmissible if it is too remote from the central issues at trial.



- Hearsay evidence rule - an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted (*R v Sharp* [1988] 1 WLR 7 at 11).

D. BEST EVIDENCE RULE

- The existence of the best evidence rule is much in doubt. At the highest, the best evidence rule might survive only in one instance, namely if an original document was "available in one's hands", one must produce it; one could not give secondary evidence by producing a copy. "Available in one's hands" meant a party had the original of the document with him in court or could have it in court without any difficulty. So the rule, if it existed, did not require evidence of a search having been made for the original (*Tang Yiu Hong v HKSAR* (2006) 9 HKCFAR 58)

E. JUDICIAL DISCRETION TO EXCLUDE – PROBATIVE VALUE AND PREJUDICE

- Generally all relevant evidence (i.e. evidence which has probative value bearing on the issue to be adjudicated) is admissible (*Chun Man Timber Development Ltd v Kwan Chia Cheng* HCA 2531/2002).
- But the court has discretion to exclude evidence obtained unlawfully so as to protect the integrity of its judicial process in case where it is unfair to rely on such evidence or where its prejudicial effect outweighs its probative value. The burden is on the party resisting admissibility of the evidence to persuade the court to exclude the evidence. (*Chun Man Timber Development Ltd v Kwan Chia Cheng* HCA 2531/2002; *Kuruma v The Queen* [1955] AC 197 and *Jones v University of Warwick* [2003] 1 WLR 954).
 - This is discussed in further detail below under the heading "Evidence unfairly or illegally obtained".
- A judge sitting with a jury should weigh carefully the probative value of a previous conviction against the prejudice to the accused that would be likely to arise in the minds of the jury. However, the risk of such prejudice overbearing the probative value of evidence is of infinitely less significance when a case is tried by a judge alone. The judge must of course guard against any such result but his whole background and training have fitted him to do so. In a trial by a judge alone the exercise of excluding the evidence on grounds of prejudice becomes somewhat unreal when it is remembered that the judge must be informed of the nature of the evidence in order to rule upon whether or not it is admissible. If the judge having ruled it inadmissible is to be trusted to put the evidence out of his mind he can surely be trusted to give it only its probative, rather than its prejudicial, weight if he rules that it is admissible. (*Attorney General v Siu Yuk-Shing* [1989] 2 HKLR 97).

3. BURDEN AND STANDARD OF PROOF

- The concept of burden of proof has two aspects: the legal burden and the evidential burden.
- The concept of standard of proof has two aspects: the criminal standard and the civil standard.
- See Specimen Direction 2.

A. LEGAL BURDENS

- In each case, the party with the legal burden of proof has the duty to prove the facts in issue and persuade the court as to the truth of his case in order for his case to win.

i. CRIMINAL CASES

- In criminal cases, subject to exceptions, the prosecution has the legal burden of proof (*Woolmington v DPP* [1935] AC 462).
- There are exceptional cases where the defendant bears the legal burden of proof ("reverse onus"):
 - A defendant bears the burden of proving a defence of insanity to a balance of probabilities (*R v McNaghten* 8 E.R. 718).
 - However, where the prosecution seeks to establish the defence's insanity, the prosecution bears the burden of proof to a standard beyond reasonable doubt (*R v Robertson* [1968] 1 W.L.R. 1767).
 - On a charge of murder, the defence bears the burden of proof that the defendant shall not be liable to be convicted of murder by showing that the defendant was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing (Section 3 of the Homicide Ordinance (Cap 339)).
 - The defence must prove all the elements stated above on a balance of probabilities (*HKSAR v Liu Chun Yip* [2006] 4 HKLRD 595; *R v Dunbar* [1958] 1 QB 1).



- Where a defendant relies upon any implied statutory exceptions, the defendant has the burden of proving the exception to a balance of probabilities (*Gatland v Metropolitan Police Commissioner* [1968] 2 QB 279).
- Where one of the elements of a criminal charge consists of an averment of a negative nature, and where the averment relates to a fact which is peculiarly within the knowledge of the defendant, then the legal burden of disproving that averment falls upon the defendant. There is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like. What shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden. (*R v Edwards* [1975] QB 27).
 - Examples include where the defendant is charged with performing an act without a licence or being in possession of a scheduled drug without a medical prescription, the defendant has the burden of proving that he in fact has the requisite licence/medical prescription ((*R v Ewens* [1967] 1 QB 322; *R v Oliver* [1944] KB 68)
 - This common law rule has been adopted in Hong Kong. Section 94A of the CPO provides that it shall not be necessary in an indictment, charge, complaint or information alleging an offence to negative any exception or exemption from or qualification to the operation of the law creating the offence; and the burden of proving the same lies on the person seeking to avail himself thereof.
 - It is a matter of statutory interpretation whether a particular statutory provision is interpreted to impose a legal or evidential burden on the defendant (*Lam Yuk Fai v HKSAR* [2006] HKCU 570; *HKSAR v Hung Chan Wa* [2006] 3 HKLRD 841).
- The derogation from the presumption of innocence (in the form of reverse onus) must be (a) rationally connected with the pursuit of a compelling legitimate societal objective (the rationality test); and (b) that the means employed - the imposition of the reverse onus - are no more than is necessary to achieve that legitimate objective (the proportionality test) (*HKSAR v Hung Chan Wa* [2006] 3 HKLRD 841).
 - The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. It has generally been accepted that an encroachment on the presumption of innocence by way of reverse onus of proof may be justified if it has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that legitimate aim. The justification must be compelling. (*Salabiaku v France* (1988) 13 EHRR 379, *HKSAR v Lam Kwong Wai* [2006] 3 HKLRD 808).
 - If the derogation from the presumption of innocence (in the form of reverse onus) does not satisfy the rationality and the proportionality tests, the persuasive burden will be read down as imposing an evidential burden only (*HKSAR v Ng Po-on* [2008] 4 HKLRD 176).

ii. CIVIL CASES

- In civil cases, the plaintiff has the legal burden to prove his claims while the defendant has the legal burden to prove any counterclaims or defences (*Amos v Hughes* (1835) 174 ER 160).
 - In civil cases, the party who wishes to prove an issue has the legal burden of prove. This includes proving a negative so that in a case of malicious prosecution, the plaintiff must prove that the prosecution by the defendant had been instituted without reasonable and probable cause (*Abrath v North Eastern Railway Co* (1883) 11 QBD 440).

B. EVIDENTIAL BURDEN

- The evidential burden generally follows the legal burden and refers to the burden to produce evidence in respect of all elements which that party is required to prove.
 - The evidential burden requires that there is sufficient evidence to raise an issue for the determination of the tribunal of fact. The imposition of an evidential burden is not inconsistent with the presumption of innocence. That is because such a burden does not create the risk of a conviction in the face of a reasonable doubt as to an essential element of the crime. (*HKSAR v Hung Chan Wa* [2005] 3 HKLRD 291)



We hope you have enjoyed this short preview of the Hong Kong Evidence Law Notes.

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